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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 580

PATRICK J. BURKE, REED J. WHITE, CHARLES SPEICKERMAN, THOMAS CONROY, ROBERT A. STEWART and FACKNEY L. SMITH, Individually and as Officers and Members of Milk Wagon Drivers and Inside Dairy Employees Union, Local 603, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and as Representatives of the Class Consisting of the Members of Milk Wagon Drivers and Inside Dairy Employees Union, Local 603, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and MAURY E. RUBIN, Doing Business as St. Louis Labor Tribune,
Petitioners,

v.

ADAMS DAIRY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

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IN THE

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OCTOBER TERM, 1956.

No. .....

PATRICK J. BURKE, REED J. WHITE, CHARLES SPEICKERMAN, THOMAS CONROY, ROBERT A. STEWART and FACKNEY L. SMITH, Individually and as Officers and Members of Milk Wagon Drivers and Inside Dairy Employees Union, Local 603, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and as Representatives of the Class Consisting of the Members of Milk Wagon Drivers and Inside Dairy Employees Union, Local 603, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and MAURY E. RUBIN, Doing Business as St. Louis Labor Tribune,
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v.

ADAMS DAIRY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

Patrick J. Burke, Reed J. White, Charles Speickerman, Thomas Conroy, Robert A. Stewart and Fackney L. Smith, individually and as officers and members of, and as representatives of a class consisting of all of the members of Milk Wagon Drivers and Inside Dairy Employees Union, Local No. 603, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America, A. F. L.,[1] hereafter collectively referred to as "Local 603," and Maury E. Rubin, doing business as St. Louis Labor Tribune, hereafter referred to either as "Rubin" or as "the Tribune," pray that a writ of certiorari issue to review a final judgment of the Supreme Court of Missouri entered in the above entitled cause on July 9, 1956, ordering that a permanent decree of injunction be entered against petitioners.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Circuit Court of St. Louis County, Missouri, denying injunctive relief is unreported, but is both contained in the record (R. 309 through 312) and printed in Appendix B hereto. The opinion of the Supreme Court of Missouri is not yet officially reported, but is reported in 293 S. W. 2d 281, and is printed in Appendix C hereto.

JURISDICTION.

On July 9, 1956, the Missouri Supreme Court, Division No. Two, entered its opinion reversing the trial court and remanding the cause "for further proceedings in accordance with the views here expressed" (p. 54, infra, R. 343).[2] A motion for rehearing or, in the alternative, to

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[1] Now AFL-CIO, the two bodies having merged since this case arose. Walter Bush, a named officer of Local 603, died since the litigation began. Local 603 is unincorporated, suable under Missouri law only through a class action (R. 7, 8, 22).

[2] While no formal judgment has been entered, such a remand finally disposes of the case so far as Missouri is concerned, leaving nothing to the judicial discretion of the trial court, that court's sole duty being to comply with the directions of Missouri's Supreme Court. The only question that could be raised on a second appeal would be whether the judgment entered conformed to the mandate, and the federal questions here presented would be foreclosed. *Prasse v. Prasse*, 342 Mo. 388, 115 S. W. 2d 807; *Abrams v. Scott*, 211 S. W. 2d 718 (Mo. Sup. en banc). This constitutes a "final judgment or decree" within the meaning of 28 U. S. C., Section 1257 (3), *Mower v. Fletcher*, 114 U. S. 127, 128; *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62, 68.

transfer to the Supreme Court en banc was denied on September 10, 1956 (R. 379). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), since rights, privileges and immunities specially set up and claimed under the Constitution and statutes of the United States have been denied.

QUESTIONS PRESENTED.

1. Where the National Labor Relations Board certifies one of two competing unions as representative of certain dairy employees, and the defeated union thereafter peaceably distributes pamphlets to customers entering stores selling that dairy's products, urging those customers not to buy that dairy's products but to buy products delivered by drivers represented by the defeated union, whether a state has jurisdiction to enjoin such activity on the grounds that its purpose violates a state statute and public policy, where the employer has not applied to the National Labor Relations Board for relief, and pleads in the state action that the purpose of such activity was to interfere with the bargaining relationship resulting from such certification, and to force the employer to coerce its employees into becoming members of the defeated union.

2. Whether a state may, consistently with the Fourteenth Amendment to the United States Constitution and where no picketing is involved, enjoin such pamphlet distribution on the grounds that no "labor dispute" under Missouri law is involved, that the activity violates state public policy in that it is for the purpose of damaging the employer's business because the employer is doing what the National Labor Relations Act requires him to do, and because of such unlawful purpose constitutes a conspiracy in violation of the state's restraint of trade statutes.

3. Where an officer of the defeated union furnishes an independently owned newspaper with a copy of the pam-

phlet, and the newspaper thereafter reproduces the pamphlet and on its own volition prepares and publishes articles which make to its readers, union members, much the same appeal as does the pamphlet, whether a state may, consistently with the Fourteenth Amendment, enjoin such publications on the ground that the newspaper knew the objectives of the union and thus became a member of the unlawful conspiracy in restraint of trade.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statutory provisions involved are Sections 2 (9), 7, 8 (a) (3), 8 (b) (1) (A), 8 (b) (2) and 8 (b) (4) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 et seq.). The constitutional provision involved is the Fourteenth Amendment to the United States Constitution. Both the relevant provisions of the Act and the Fourteenth Amendment are reprinted in Appendix A hereof.

STATEMENT.

A. The Labor Dispute.

Adams Dairy, Inc., hereafter referred to as "Adams," processes and sells milk and milk products exclusively at wholesale to retail stores in Missouri and Illinois (R. 7). From 1947 until July, 1954, Local 603 was the recognized bargaining agent for the Adams' milk wagon drivers (R. 9, 10, 24). In 1954, pursuant to a consent agreement between Adams, Local 603, and Independent Wholesale Dairy Products Salesmen's Association (hereafter called "the Association"), a newly formed organization of some of Adams' drivers, the National Labor Relations Board conducted a representation election, resulting in the Association being certified as representative of these drivers

(R. 40, 41, 42, 45). Thereafter, the Association and Adams reached a bargaining agreement to run until August 31, 1956 (R. 10).

For several years, Local 603 has been urging the public by pamphlets, radio and other media to have milk delivered at home and to buy only extra milk at the store (R. 99, 100, 148, 157), while Adams has used radio, TV, and newspapers to carry its appeal, "Why pay more at the door when you can buy cheaper at the store" (R. 88, 91, 199). Though other dairies sell wholesale to stores, Adams is the only one campaigning for store purchases rather than home delivery (R. 107).

Local 603 represents all dairy employees in the St. Louis area except Adams' milk wagon drivers, and all such Local 603 drivers work under an identical industry-wide contract (R. 50, 75). The Adams agreement with the Association calls for less commission rates than called for in the Local 603 contract (R. 93). Local 603 became concerned about Adams' buy-at-the-store campaign, about its ability to sell cheaper than dairies employing Local 603 members because of lower commission rates, about the resultant weakening in the bargaining power of Local 603, and about the probability of losing retail or home-delivery drivers as members (R. 75, 89, 90, 91).[3] To combat this situation, Local 603 inquired of its attorney as to the legality of pamphletizing, and requested said attorney to prepare a pamphlet or circular (R. 75, 94), which reads as follows (pp. 33, 34, infra, R. 323, 324):

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[3] Of Local 603's approximately 2300 members, about 950 to 1000 deliver milk to the home, and 300 to 350 deliver to stores, restaurants and other wholesale outlets (R. 49, 81).

"DO NOT BUY
ADAMS DAIRY COMPANY PRODUCTS
WHEN YOU PATRONIZE THIS STORE

THIS IS WHY

"The Dairies of Metropolitan St. Louis listed on the reverse side of this pamphlet are the finest in the world and some of them supply this store with their products. Those Dairies employ members of our Union for the delivery of their products and grant our members good wages, hours and working conditions. We are anxious to advertise this fact to the public and to urge the people of the St. Louis area to favor those Dairies with their business.

"There is nothing wrong with the products of the Adams Dairy Company. Our only reason for asking you to refrain from purchasing them is that we want to see the Dairies who employ our drivers get the business. This will not only help the Dairies of Metropolitan St. Louis who employ our drivers but will also be of assistance to the cause of the American Federation of Labor (AFL) and the Congress of Industrial Organization (CIO).

"Permit us to make it clear that WE ARE NOT PICKETING THIS STORE AND HAVE NO DISPUTE WITH IT. Continue to patronize this store as you have in the past. We merely urge you to refrain from purchasing the products of Adams Dairy Company when you do business here.

Milk Wagon Drivers, Inside Dairy Workers
Local Union 603
I. B. of T. C. W. & H. of A."

On the back of said pamphlet were listed all dairies except Adams.

Distribution began at meetings of other unions, but in December, 1954, was extended to customer entrances at about sixty stores handling Adams' milk (R. 55). Distributors of pamphlets carried no umbrellas or placards, distributed at customer entrances only without coercion or argument, and the activity was entirely peaceful (R. 54).

Petitioner Rubin is editor and sole owner of the St. Louis Labor Tribune, a weekly newspaper devoted to the cause of organized labor, with a paid circulation of about 78,000 union members (R. 8). Burke gave Rubin a copy of the pamphlet and explained Local 603's position but did not request him to do anything nor did any other official of Local 603 (R. 222, 223). Thereafter, Rubin reprinted the pamphlet in the Tribune, and also wrote and published, without request or participation of any Local 603 officer (R. 257, 258, 259, 260), a series of articles, the general tenor of which was to urge readers not to buy Adams milk, but to buy from 100% AFL dairies (p. 37, infra, R. 327).[4] At the same time, Adams was attaching to each carton of milk a tag which read (R. 114, 200, 207): "Adams Milk is 100% union. Union certified by NLRB. This milk processed by employees who are members of A. F. of L. Local 603. Patrick J. Burke, Secretary." Local 603 has never been certified by the NLRB (R. 297), and Burke never gave permission to so use his name (R. 278).

B. **The Proceedings Below.**

Adams filed suit in the Circuit Court of St. Louis County, Missouri, demanding an injunction against the pamphletizing and newspaper publications, and damages under Mis-

[4] Adams did employ Local 603 members as inside workers, clerks and ice cream drivers, hence it was classed as "not a 100% AFL dairy." Some articles contained references to Adams as "not 100% union," but Rubin testified this was an oversight and he meant "not 100% AFL," and that a reading of the whole article showed clearly this meaning (R. 239, 240, 242).

souri's restraint of trade statutes. By consent, the issues on the temporary and permanent injunction were tried together, and the damage count reserved for later hearing (R. 40). Adams pleaded generally that Local 603 and Rubin had engaged in the pamphletizing and publications above described, and had informed Adams that such activity would be continued until Adams coerced its drivers to become members of Local 603; that such activity was in furtherance of an unlawful conspiracy in restraint of trade in violation of Section 416.010 et seq., R. S. Mo. 1949;[5] that by such conduct Local 603 and Rubin were attempting to coerce Adams' drivers in the exercise of rights of self-organization and bargaining through freely chosen representatives, and to coerce Adams to interfere with such rights, in violation of Article I, Section 29, Constitution Missouri, 1945, as well as to interfere with the bargaining agreement between Adams and the Association (R. 10 through 17). The cited Missouri Constitutional provision reads: "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." Said petition alleged the certification proceedings before the National Labor Relations Board and subsequent unfair labor practice charges filed with the Board by Local 603 against Adams, but dismissed for lack of evidence (R. 9, 10).

In their answer, Local 603 and Rubin affirmatively pleaded that their conduct was protected by the Fourteenth Amendment to the United States Constitution and by Section 7 of the National Labor Relations Act, and that Mis-

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[5] Section 416.010 reads: "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade" and subject to punishment thereafter specified.

souri courts had no jurisdiction, because the labor relations of Adams came under the jurisdiction of the National Labor Relations Board, the sole primary tribunal to determine said controversy (R. 31, 32, 33).

C. **Opinions of the Courts Below.**

The trial court, in denying injunctive relief, issued a memorandum opinion in which it found that Adams failed to prove any unlawful purpose or conduct, finding that the purpose of the pamphletizing was to counteract Adams' buy-at-the-store campaign, and noting the distinction drawn by Missouri appellate courts between picketing and other forms of communication. It did not pass upon the federal versus state jurisdictional question (Appendix B, R. 309 through 312).

On appeal by Adams the Missouri Supreme Court held it had jurisdiction, because Adams had not alleged any "unfair labor practices" under the Act; because Local 603 and Rubin were not attempting to exercise any right protected by Section 7 of the Federal Act; because there was no showing of violation of Section 8 (b) (4) of the Act;[6] and because such activities, being not for a lawful labor objective, involved no labor dispute, and removed the case from the field of labor relations and the doctrine of Garner and other opinions of this Court holding federal jurisdiction paramount (p. 53, infra, R. 341, 342). On the merits, the Missouri Supreme Court held there was a "consumption boycott," which would be a lawful concerted action if done for an objective reasonably related to a

[6] Though the petition was founded principally on allegations of interference with employees' rights of self-organization and bargaining through representatives of their own choosing as noted; though Adams' brief in the Missouri Supreme Court, particularly Point III thereof, pages 30 through 34 (said brief has been separately certified) relied largely on this theory, still the Missouri Court did not consider Sections 8 (b) (1) (A) or 8 (b) (2) at all.

legitimate interest of organized labor; that it found no such objective, but rather that the purpose was to damage Adams' business, because it recognized the Association as representative of the drivers as required by the Board; that such unlawful purpose made such concerted activities a conspiracy in violation of Missouri's restraint of trade statute; and that Rubin was a co-conspirator, because he knew of the objectives of Local 603 (pp. 39 to 45, incl., infra, R. 329 through 334). The Missouri Supreme Court rejected the contention that such activities were protected by the Fourteenth Amendment, on the ground that no "labor dispute" was involved, and rejected the contention that there was a distinction between picketing and other forms of communication (pp. 45, 46, 47, 48, infra, R. 335, 337). The Missouri Supreme Court ruled that the trial court had erred in denying injunctive relief and remanded the cause for further proceedings in accordance with the views expressed in its opinion (p. 54, infra, R. 343).

D. **How the Federal Questions Are Presented.**

Local 603 and Rubin's answer affirmatively alleged that Missouri courts had no jurisdiction over this controversy because the National Labor Relations Board was the sole primary tribunal to determine it (R. 32, 33, 34), and that their conduct was protected both by Section 7 of the National Labor Relations Act and by the Fourteenth Amendment (R. 31, 32). The trial court determined that the conduct was protected under the Fourteenth Amendment, but did not pass on the jurisdictional question (R. 309 through 312). The Missouri Supreme Court expressly considered both the jurisdictional question (pp. 48 to 54, incl., infra, R. 337 through 342), and whether the activities were protected under the Fourteenth Amendment (pp. 45, 46, 47, 48, infra, R. 335, 336, 337) deciding both questions against these petitioners. In Motion for Rehearing or to Transfer to Court en banc, that court's attention was directed to the

conflict between its opinion and opinions of this Court on both jurisdiction (R. 346, 347) and free speech (R. 348, 349), but said Motion was overruled (R. 379).

REASONS FOR GRANTING THE WRIT.

So far as can be determined, never has this Court been presented with a case, as here, where in connection with a labor dispute the peaceful distribution of pamphlets by a union, together with newspaper publications in support of the union's position, have been denied the protection of the Fourteenth Amendment; or where a state has refused to acknowledge that the National Labor Relations Board is the sole primary tribunal to determine whether or not this particular conduct should continue, there being no question but that the employer's labor relations are governed by the National Labor Relations Act, as amended. Petitioners submit that the opinion of the Missouri Supreme Court is directly in conflict with many opinions of this Court as now demonstrated:

1. On the question of state v. federal jurisdiction, the opinion of the Missouri Supreme Court is directly in conflict with these opinions of this Court: **Garner v. Teamsters Union**, 346 U. S. 485; **Weber v. Anheuser-Busch, Inc.**, 348 U. S. 468; **Capital Service, Inc. v. N. L. R. B.**, 347 U. S. 501, and **Teamsters Union v. New York N. H. & H. R. Co.**, 350 U. S. 155.

Stripped of all extraneous matter, Adams' petition charged that the circularizing and publications were to coerce Adams' drivers in the exercise of rights which are among those guaranteed by Section 7 of the National Labor Relations Act, and to force Adams to interfere with those rights. In so pleading, Adams carefully avoided any reference to the Federal Act, and the Missouri Supreme Court erroneously distinguished the instant case from **Weber v. Anheuser-Busch, Inc.**, supra, on the ground that

no "unfair labor practices" under the Federal Act were charged (p. 49, infra, R. 338). This directly conflicts with **Garner v. Teamsters**, supra, in which no unfair labor practice charges under the Federal Act were pleaded, but only charges of violation of the Pennsylvania statutes, and yet this court denied Pennsylvania jurisdiction. It conflicts with **New York, N. H. & H. R. Co.**, supra, wherein original allegations of violation of the Federal Act were not only stricken, but the railroad conceded that no violation of that Act was involved (350 U. S., at 161), and yet Massachusetts was denied jurisdiction because, as said in **Garner** (346 U. S., at 489), "The power and duty of primary decision lies with" the National Labor Relations Board. Also, there is a direct conflict with **Weber**, supra, which did not hold that charges of "unfair labor practices" under the Federal Act must be directly charged, but included cases "where the facts reasonably bring the controversy within the sections prohibiting these practices" (348 U. S., at 481).[7]

The Missouri Supreme Court's opinion conflicts with opinions of this Court in attempting, as it does, to make a finding that Local 603 was not exercising any right guaranteed under Section 7 of the Federal Act (pp. 49, 50, infra, R. 338, 339), and that no "unfair labor practices" under the Federal Act had been proven (pp. 50, 51, 52, 53, infra, R. 339, 340). **Garner, Weber** and **New York, N. H. & H. R. Co.**, supra, all hold that the sole primary tribunal to determine these questions is the National Labor Relations Board. While petitioners earnestly contend that their activities are protected by Section 7 of the Act, and deny that any "unfair labor practice" was committed, no further argument is advanced on that point since this Court has said that not even it can determine those questions in the first instance.

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[7] In *S. E. Overton Co. v. Teamsters*, 115 F. Sup. 764, 768, it was held that jurisdiction is not conferred on state courts because specific reference to the Federal Act is omitted in the pleadings if the facts pleaded bring the case within the purview of that Act.

Missouri seeks to deny Federal supremacy by holding that Section 7 does not protect concerted activity[8] violating valid state law (p. 50, infra, R. 339). This court emphasized again in **Auto Workers v. Wisconsin Employment Relations Board**, 351 U. S. 266, 274, that state courts retain jurisdiction only in connection with such matters as mass picketing, violence, threats of violence and other breaches of the peace. Here we have only peaceful distribution of pamphlets and publication of newspaper articles, held to be for an unlawful purpose under Missouri public policy.[9] Where only "purpose" is involved, as here, this Court has consistently held that federal supremacy cannot be curtailed by a state, even if the ground of intervention by the state be other than on labor relations grounds. **Weber v. Anheuser-Busch, Inc.**, supra, 348 U. S., at 480, in which picketing was found to be for a purpose in violation of Missouri's restraint of trade statutes, as here; **General Drivers Union v. American Tobacco Co.**, 348 U. S. 978, in which a state court had held refusal to cross a picket line

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[8] The Missouri Supreme Court recognizes the pamphletizing and publication as a "consumption boycott", and as a form of "concerted activity" which a union may use to obtain a lawful objective, though concluding no such lawful objective was proven (p. 39, infra, R. 329).

In *Capital Service, Inc., v. N. L. R. B.*, 347 U. S. 501, in addition to picketing delivery entrances, the unions carried placards at customer entrances urging the public not to buy Service's products. The state court enjoined both activities. Though the General Counsel refused to issue a complaint to enjoin the customer entrance activity (347 U. S. 501, 502) still this Court sustained an injunction enjoining Service from enforcing the state court injunction, though it enjoined the appeals to Customers as well.

[9] The conduct was held unlawful because in violation of Missouri's restraint of trade statutes. Missouri does not hold even picketing as violating that statute, unless conducted for an unlawful purpose or by unlawful means (pp. 44, 45, infra, R. 334). Missouri has found the pamphlet and newspaper campaign to be for the unlawful purpose of injuring Adams' business because Adams is doing what the Federal Act compels it to do, recognize the Association (p. 43, infra, R. 332). This, too, is an issue within the sole primary jurisdiction of the Board to determine.

unlawful as an interference with a common carrier's duty to serve without discrimination.

Moreover, the Missouri Supreme Court, in finding no "unfair labor practice" involved, considered only Section 8 (b) (4) of the Federal Act, ignoring entirely Adams' pleading that the purpose of the pamphlet and newspaper campaign was to interfere with, and cause Adams to interfere with, rights of self-organization and bargaining through representatives of their own choosing (pp. 50, 51, 52, 53, infra, R. 339, 340, 341). The case was pleaded, tried and briefed on that theory. Such charges allege violations of Sections 8 (b) (1) (A) and 8 (b) (2) of the Federal Act (Appendix A). In **Weber v. Anheuser-Busch, Inc.**, 348 U. S., at 478, jurisdiction in state courts was denied because the employer had not filed all possible charges under the Federal Act.[10]

Similarly, the Missouri Supreme Court's opinion conflicts with opinions of this court, both in attempting to determine if a "labor dispute" exists, and in its finding that no "labor dispute" exists. The ultimate fact of whether or not a "labor dispute" exists, just as whether an "unfair labor practice" is committed or a right protected, is a matter for determination by the Board, under the definition of a "labor dispute" as contained in Section 2 (9) of the National Labor Relations Act, as amended.[11] Also,

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[10] Adams pleaded the pamphletizing was "picketing"; it alleged coercion of stores desiring to handle Adams' products (R. 11). Such allegations and the requisite proof could involve Sections 8 (b) (4) (A), (B), (C) and (D), e. g., *Washington Coca-Cola Bottling Co.*, 107 N. L. R. B. No. 104; *Swift & Co.*, 113 N. L. R. B. No. 31.

[11] Which reads: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

in a case very similar on its facts, this Court held that picketing by a milk wagon drivers' union to compel elimination of "vendor" deliveries by men organized in a rival union, was a "labor dispute" within the meaning of Section 13 (c) of the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. 101 et seq.), which defines the term almost precisely as it is defined in the National Labor Relations Act. **Milk Wagon Drivers Union v. Lake Valley Co.**, 311 U. S. 91.

Adams has not applied to the National Labor Relations Board for relief. Missouri courts, therefore, have no jurisdiction, to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies (346 U. S. at 490). Moreover, to permit Missouri to enjoin the activities here involved would do violence to the principle announced in **Garner** (346 U. S. at 499-500) that the policy of the National Labor Relations Act is "not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." Equally, if not more applicable, is this doctrine to pamphletizing and publicizing by newspaper as here.

Finally, on this point, on November 5, 1956, this Court reversed the Idaho Supreme Court in a case very similar to this one. In **Pocatello Bldg. & Construction Trades Council v. C. H. Elle Const. Co.**, ... U. S. ... (No. 372, Oct. Term, 1956), the Idaho Supreme Court (297 Pac. 2d 519) had enjoined picketing and placement of an employer on an "unfair list," such activities having begun shortly after one of the defendant unions had lost an N. L. R. B. election. The Idaho Supreme Court found that there was no "labor dispute," that its jurisdiction was not preempted by the National Labor Relations Act, and that such activities violated the state Secondary Boycott Act.

Such opinion was reversed by this Court per curiam, citing **Weber v. Anheuser-Busch, Inc.**, 348 U. S. 468.

2. Aside from the jurisdictional question, petitioners contend that the pamphletizing and newspaper publications are protected by the Fourteenth Amendment to the United States Constitution.[12]

Here there is no question of unlawful conduct, i. e., conduct which would be unlawful regardless of purpose, such as violence or mass picketing. All that is involved is whether the conduct or activity is enjoinable because of its purpose. That picketing for an unlawful purpose may be enjoined and is not constitutionally protected is admitted. But in failing to find a distinction between picketing and circularizing or newspaper publications (p. 48, infra, R. 337) Missouri's opinion conflicts squarely with opinions of this Court on this point. In **Giboney v. Empire Storage Co.**, 336 U. S. 490, 503, this Court found the pickets there to be "doing more than exercising a right of free speech or press." Cited in the Court's footnote 6 were quotations from **Bakery Drivers Local v. Wohl**, 315 U. S. 769, 776-777, that "picketing by an organized group is more than free speech" and that its aspects of patrol and ability to produce action irrespective of the message disseminated "make it the subject of restrictive legislation"; also, **Thomas v. Collins**, 323 U. S. 516, 537-538, wherein it was said that when to persuasion "other things are added which bring about coercion, or give it that character, the limit of the right (of free speech) has been passed." In **Hughes v. Superior Court** (339 U. S. 460, 465) it was held that newspapers and circulars may convey the same information or charge as does a picket line, but the "very purpose of a picket line is to exert influences, and

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[12] The freedoms of speech and press secured by the first amendment against abridgement of the United States are similarly secured to all persons by the 14th amendment against abridgment by a state. *Schneider v. State*, 308 U. S., at 160.

it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed words."[13] So this Court has drawn a real distinction between picketing and other forms of communication, so far as constitutional protection is concerned. Here there was no picketing, no placard carrying, no umbrellas, nothing but peaceful distribution of pamphlets to customers at customer entrances only, plus similar appeals made in a labor newspaper. There was no contention, no evidence, and no finding that any coercion was exerted either against the consuming public or the store owners by reason of this distribution and publication. The coercive effects of picketing which make it the "subject of restrictive legislation" (and judicial control) (315 U. S., at 777) were not present.

Missouri found the pamphlet distribution and publications unlawful and enjoinable because such activity restrained the purchase and sale of Adams' products in violation of the state's restraint of trade law (p. 45, infra, R. 334). As noted, Missouri does not interpret that law as barring union concerted activities, even picketing, unless for an unlawful purpose.[14] Here, Missouri held the conduct unlawful, not because such conduct in and of itself

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[13] In *Building Service Employees v. Gazzam* (339 U. S. 532, 537), it was held that "picketing is more than speech" and "has far more potential for inducing action or non-action than the message the pickets convey." *Meat Cutters v. Purnell Sausage Co.*, 264 S. W. 2d 870 (Ky. Ct. App.), and *Thompson Co., Inc., v. Delicatessen Union*, 126 N. J. Eq. 119, 8 A. 2d 130, both held an injunction against picketing did not bar oral appeals or circulars urging customers not to patronize the employers involved.

[14] In *Caldwell v. Anderson*, 357 Mo. 1199, 212 S. W. 2d 784, cited by the Missouri Supreme Court on this point, picketing was held lawful and not in violation of this statute though for the purpose of forcing an employer to sign a closed shop agreement to hire only union men and contract only with subcontractors hiring union men.

violates the restraint of trade statute,[15] but because Missouri found no legitimate labor objective and no labor dispute, under its definition thereof. The Missouri high court conceded that the objective of the campaign was to cause the public to buy milk delivered exclusively by Local 603 members, and held this as "somewhat kindred to the appeals made by unions to the public in connection with a labor dispute that it should buy or use only the products of an employer who hires union labor" (p. 43, infra, R. 332). Missouri thus concedes this latter appeal as lawful and unenjoinable, as indeed it must be under **Thornhill v. Alabama**, 310 U. S. 88; **A. F. of L. v. Swing**, 312 U. S. 321. But the Missouri Supreme Court then went on to hold that the instant appeal is not lawful because it was done because Adams was complying with the N. L. R. B. certification order (p. 43, infra, R. 332). Apart from the jurisdictional question heretofore discussed, if it be lawful to picket an employer and urge the public not to patronize him because his employees are non-union, and thus damage his business, as Thornhill and Swing, supra, hold, why is not constitutional protection given to the appeal to patronize only dairies whose milk is delivered by Local 603? The association contract with Adams had a lesser commission rate than in effect in the Local 603 industry-wide agreement, and this affected Local 603's bargaining power and was a reason for commencement of the pamphlet campaign (R. 75, 89, 91).[16] Surely, if the "practices

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[15] The distinction between the instant case and *Giboney v. Empire Storage Co.*, supra, is that in the latter case all ice companies except Empire had joined in a conspiracy with the union not to sell to non-union peddlers, and the picketing of Empire was to force it to join this conspiracy. Here, we have no such combination of employers and union, but only an appeal to consumers.

[16] It is true that the Missouri Supreme Court rejected Local 603's evidence on this objective. Also, while the evidence is clear that Adams was the only dairy urging the public to buy all milk at the store rather than to have it delivered (R. 88, 91, 199); that this jeopardized the jobs of Local 603 home delivery members, and

in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing" (**Thornhill v. Alabama**, 310 U. S. 88, 103), is it not equally dangerous to have a single dairy paying less commissions to employees in an independent, intra-company union, being thus able to undercut dairies employing AFL members? Moreover, the problem of store purchases v. home delivery, mentioned in footnote 16 above, is an issue which can affect the entire community, and one in which Local 603 should be able to publicize its position.

The Missouri high court bases its finding of unlawful purpose largely on the absence of a "labor dispute" as it defines that term. One need not be in a "labor dispute" as defined by state law in order to peaceably express a grievance in a labor matter by publication (315 U. S., at 774), nor may the state define the term so narrowly as to accomplish indirectly what it may not do directly (315 U. S., at 777); neither may it confine the term to a dispute between an employer and his employees (312 U. S., at 326). The Missouri Supreme Court opinion on the "labor dispute" issue conflicts with both these opinions of this Court.

It conflicts further with **Thornhill v. Alabama**, supra, wherein this court held (310 U. S., at 104, 105), in speaking of the rights of a union to express its opinion and persuade persons not to deal with a business establishment:

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold

was a reason for the pamphlet campaign (R. 75, 89, 91); the Missouri high court rejected this contention (pp. 41, 42, infra, R. 331). These are "insubstantial findings of fact screening reality" and this court is not bound by them. *Plumbers Union v. Graham*, 345 U. S. 192, 197; *Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 293-294.

> that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

Here, Local 603 has urged the public not to buy Adams' milk but to buy that delivered by Local 603 members. Adams, in turn, has engaged in its TV, radio and newspaper publicity urging store purchases, and has also counteracted the Local 603 campaign by the affixing of tags or coupons on its milk as set out above, p. 7, supra. The trial court recognized this as a counter-publicity campaign, each side seeking to invoke the aid of the public to its cause, and as Constitutionally guaranteed free speech (pp. 28, 29, infra, R. 312). The Missouri Supreme Court, contrary to the opinions of this Court, has refused to give such Constitutional protection.[17] In **E. L. Kerns Co. v. Landgraf**, 128 N. J. Eq. 441, 16 A. 2d 623, the New Jersey Court of Errors and Appeals, in upholding the right of a union to distribute circulars in almost the same form as the one here employed, held such distribution Constitutionally protected under the authority of **Thornhill v. Alabama**, supra, saying (at 626):

> "If a merchant may freely, fairly, honestly and peacefully compete with other merchants as is the daily common practice, 'by means of advertisements in the press (or) by circulars, or by his window display' or by radio, so a union may in like manner, here by circulars, compete with non-union concerns for customers. * * * If injury results it is damnum absque injuria."

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[17] In *Schneider v. State*, 308 U. S. 147, ordinances restricting pamphlet distribution were held unlawful, though the municipalities contended the law was to keep the streets unlittered; in *United States v. Hutchison*, 312 U. S. 219, 243, requests made to the public by letters and newspaper publications not to buy certain beer were held to be protected free speech.

3. The Constitutional protection which petitioners contend should be given to the pamphletizing, under Point 2, supra, applies more strongly to the publications in the Tribune. The Tribune is independently owned and it is circulated among union members. The sole evidence on which the Tribune was held to be a co-conspirator was a statement in the answer filed that "Local 603 caused certain appeals to the public to be published in the Tribune" (p. 37, infra, R. 327). Yet, the Missouri Supreme Court also found that defendant Burke of Local 603 gave Rubin a copy of the pamphlet, explained the position of Local 603, but did not request Rubin to do anything (p. 37, infra, R. 327). In addition, the uncontroverted evidence was that Rubin wrote all articles in the Tribune without request or participation by any Local 603 officer (R. 257, 258, 259, 260). Yet the Tribune was labeled a co-conspirator. This is certainly an "insubstantial finding of fact screening reality" (312 U. S., at 293-294).

The Tribune is a newspaper devoted to the cause of organized labor, and Rubin does not consider the Association as a part thereof (R. 228). As a militant union newspaper, the Tribune "took sides", and to enjoin its voice does violence to our principles of free speech. Where is the "clear and present danger", and what "substantive evil" will be brought about by such publications? In **Bridges v. California** (and **Times Mirror Co. v. Superior Court**), 314 U. S. 252, a newspaper had been cited for contempt for publishing an editorial practically ordering a judge to deny probation in a pending case. This court said (at 262, 263):

> "Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in Whitney v. California, supra, 374; it must be 'serious', i. d. 376. * * *

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally —it prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Surely, that amendment (and the Fourteenth, as well) should not be narrowed as to deny protection to a labor newspaper which takes sides in a dispute such as this simply because the state court does not agree that the objective of the union supported by the newspaper is a "legitimate" one. The only danger is the loss of some sales of milk, and no substantial loss was in fact shown. Never has the right of free speech been denied simply because an appeal may result in loss of some customers.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the foregoing petition for certiorari should be granted.

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APPENDIX A.

STATUTORY AND CONSTITUTIONAL PROVISIONS.

National Labor Relations Act as amended (28 U. S. C. 101 et seq.; 61 Stat. 136):

Section 2 (9): "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Section 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 8 (a) (3): "It shall be an unfair labor practice for an employer— * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *"

Section 8 (b): "It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Pro-

vided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *"

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor or-

ganization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work; * * *"

Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B.

JUDGMENT AND MEMORANDUM OPINION OF CIRCUIT COURT, ST. LOUIS COUNTY, MISSOURI.

Said Judgment and Memorandum Opinion filed in Court February 7, 1955, are in the words and figures as follows:

In the Circuit Court of the County of St. Louis,
State of Missouri.

Adams Dairy, Inc., a Corporation, Plaintiff, vs. Patrick J. Burke et al., Defendants.	No. 207,042. Div. 1.

Finding and Judgment.

"This cause having been heretofore submitted to the Court upon the pleadings, evidence and proofs adduced, and the Court having seen and heard the same and being now duly and fully advised of and concerning the premises, finds the issues herein joined in favor of the defendants and against the plaintiff, with denial of injunction and dismissal of so much of plaintiff's petition as seeks equitable relief. Wherefore, it is ordered and adjudged by the Court that so much of plaintiff's petition as seeks equitable relief be and is hereby dismissed, that injunction be and is hereby denied and that defendants go hence without day with their costs herein incurred. Memo of Court filed."

Memo of Court.

"Counsel will recall that the Court took with the case certain objections as to the evidence in the case. The evi-

dence was admitted as to the Labor Tribune, but no action was taken when it was offered as to all defendants. After considering the matter I have decided to overrule the objection and admit the evidence as to all defendants inso far as it goes.

After considering the authorities—and reading **all** of the cases submitted by the plaintiff, and nearly all of those submitted by the defendants, I have come to the conclusion that the injunction should not issue and am making such an order today, for the reasons outlined below.

I.

The burden was upon the plaintiff to prove a conspiracy and in my judgment it failed to discharge this burden. A number of the cases in Missouri have a bearing on the subject, but particularly the case of Gruet v. Briner, 229 S. W. 2d 259, and Missouri Cafeteria v. McVey, 362 Mo. 583, 242 S. W. 2d 549.

II.

The plaintiff failed to prove that there was a violation of the restraint of trade statutes or, indeed, that there was anything unlawful or illegal about the conduct of the defendants. Under the case of Kincaid-Webber Motor Co. v. Quinn, 241 S. W. 2d 886, if the picketing had been of the business place of Adams Dairy, Incorporated, an injunction should issue because the NLRB has certified the union whose members now do the driving for the plaintiff, and that authority would be controlling; however, the defendants did not follow that plan, but evidently took particular pains, under the advice of their attorneys, to avoid acting unlawfully or illegally.

For instance, in the case of Rogers v. Poteet, 199 S. W. 2d 378, l. c. 393, the Supreme Court en banc pointed out

that the injunction which was granted by the lower court was too far-reaching and said that 'the appellants would have a constitutional right by peaceful picketing and **persuasion**, and not involving violence, intimidation and coercion to advocate the cause of their Union and thereby advance their own interests.'

In Wolferman v. Root, 204 S. W. 2d 733, the Supreme Court again held that the trial court, in issuing the injunction, should have permitted 'informing the public under defendants' right of freedom of speech, that plaintiff's butchers were not union members,' l. c. 738.

In Empire Storage and Ice Company v. Giboney, 210 S. W. 2d 55 (Supreme Court en banc, 1948) where the issuance of an injunction was approved, the Court quoted from the United States Supreme Court in the case of Bakery Drivers v. Wohl, 315 U. S. 769, 86 Law Edition 1178, to the effect that '* * * one need not be in a labor dispute * * * to have a right under the 14th Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.'

In State ex rel. v. Thatch, 234 S. W. 2d 1, the Supreme Court (1950), in discussing the Taft-Hartley Act, points out that the law does not 'exclude peaceable persuasion, oral or written, by the members of a labor organization, absent threats, force or promise of benefit.' l. c. 9.

It is evident that the course of conduct followed by the Labor Union was in effect tailored to comply with these decisions and to avoid illegal and unlawful conduct.

The leaflet which was distributed by the Union is so worded that it does nothing contrary to law. It is true that it did not disclose that the drivers of the plaintiff are already members of a Union. The plaintiff, therefore, was entitled to show the public and others interested that its drivers were unionized and to put its case in the best pos-

sible light, which it evidently attempted to do by the tabs attached to its products before distribution to its customers. At the risk of being considered naive, it may be stated that the reason alleged by the defendants for the distribution of the leaflets in question is a plausible one. There seems to be no question but that the sale of milk at the stores has been increasing and as a corollary thereto, it would seem that less milk would be delivered by the milkwagon drivers to the homes of the people and thus the union members would be affected in their work. There was ample showing that some of the leaders of the Union had, for years, advocated delivery of commodities to the home, rather than obtaining them at the place of purchase.

R. E. LaDriere,
Circuit Judge, Div. No. 1."

APPENDIX C.

OPINION OF SUPREME COURT OF MISSOURI.

In the Supreme Court of Missouri,
Division Number Two.

Adams Dairy, Inc., a corporation,
Appellant,

vs.

Patrick J. Burke, Reed J. White, Charles Speickerman, Thomas Conroy, Walter Bush, Robert A. Stewart and Fackney L. Smith, individually and as officers and members of Milk Wagon Drivers and Inside Dairy Employees, Union Local 603, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and as representatives of the class consisting of the members of Milk Wagon Drivers and Inside Dairy Employees, Union Local 603, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and

Local 603, Milk Wagon Drivers and Inside Dairy Employees Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and

John Doe and Richard Roe, and

Maury E. Rubin, doing business as St. Louis Labor Tribune,
Respondents.

(Filed July 9, 1956, in Office of Clerk Supreme Court.)

No. 44965.

Appeal From the Circuit Court of the County of St. Louis, Honorable Raymond E. LaDriere, Judge.

This suit was filed in the Circuit Court of St. Louis County, Missouri, by plaintiff, a corporation engaged in processing milk and selling the milk and milk products exclusively at wholesale to retail stores in the St. Louis area, to enjoin certain acts of the defendants alleged to constitute an illegal conspiracy designed to injure and destroy its business, and for damages alleged to have been caused to its business by such acts.

The defendants, except Maury Rubin, are members, officers and agents of Local 603, Milk Wagon Drivers and Inside Dairy Employees Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL. The action is brought against Local 603 and the above named defendants individually and as a class. Maury Rubin is the sole owner and publisher of a weekly newspaper published in St. Louis known as the St. Louis Labor Tribune.

The parties agreed to try together the issues on both the temporary and permanent injunction, and it was stipulated that the portion of plaintiff's petition relating to damages would be reserved for later hearing. At the conclusion of the evidence the trial court dismissed "so much of plaintiff's petition as seeks equitable relief" and plaintiff has appealed. Our appellate jurisdiction is invoked on the ground that constitutional questions are involved under the first and fourteenth amendments of the United States Constitution, and Missouri Constitution of 1945, Article I, section 29.

Plaintiff's employees may be divided into three groups: (1) inside workers and clerical employees, (2) ice cream wagon drivers, and (3) milk wagon drivers. From the time plaintiff entered business in the St. Louis area and

until July, 1954, Local 603 was the recognized collective bargaining representative for each of the three groups, and plaintiff and Local 603 had a contractual relationship covering each group. In 1954 plaintiff and Local 603 entered into contracts for the first two groups named above, but some of the employees in group 3 formed an organization known as the "Independent Wholesale Dairy Products Salesmens Association," hereafter referred to as the "independent union" which submitted a petition to the National Labor Relations Board, hereafter referred to as "N. L. R. B.," requesting certification. The N. L. R. B. conducted an election, to which Local 603 and plaintiff consented, and the independent union was selected by a majority of the employees in group 3. Immediately after the result of the election was known, Local 603 filed charges with the N. L. R. B. alleging that plaintiff had engaged in unfair labor practices in violation of Section 8 (a) of the Labor Management Relations Act, 1947, 29 U. S. C. A., § 141, et seq., hereafter referred to as the "federal Act," in that it had coerced and intimidated its employees to support the independent union. These charges were subsequently dismissed by the N. L. R. B. after being "carefully investigated and considered" for the reason that there was "insufficient evidence of violations." The N. L. R. B. certified the independent union as the exclusive collective bargaining representative for all the employees in group 3 and plaintiff entered into a contract with that union.

The defendants pleaded, and at the hearing the officers of Local 603 testified, that the certification by the N. L. R. B. of the independent union is not being challenged, that Local 603 does not claim to represent plaintiff's employees in group 3 for any purpose, that since the certification it has not requested or demanded of anyone that Local 603 be recognized as the collective bargaining representative for said employees, and further that the defendants have

not requested or demanded of plaintiff, or anyone else, that plaintiff's employees in group 3 be coerced into joining Local Union 603.

A short time after the above mentioned certification by the N. L. R. B. of the independent union, the executive board of Local 603 authorized and directed the distribution by members of the union of pamphlets worded as follows:

"DO NOT BUY
ADAMS DAIRY COMPANY PRODUCTS
WHEN YOU PATRONIZE THIS STORE

THIS IS WHY

"The Dairies of Metropolitan St. Louis listed on the reverse side of this pamphlet are the finest in the world and some of them supply this store with their products. Those Dairies employ members of our Union for the delivery of their products and grant our members good wages, hours and working conditions. We are anxious to advertise this fact to the public and to urge the people of the St. Louis area to favor those Dairies with their business.

"There is nothing wrong with the products of the Adams Dairy Company. Our only reason for asking you to refrain from purchasing them is that we want to see the Dairies who employ our drivers get the business. This will not only help the Dairies of Metropolitan St. Louis who employ our drivers but will also be of assistance to the cause of the American Federation of Labor (AFL) and the Congress of Industrial Organization (CIO).

"Permit us to make it clear that WE ARE NOT PICKETING THIS STORE AND HAVE NO DISPUTE WITH IT. Continue to patronize this store as you have in the past. We merely urge you to refrain

from purchasing the products of Adams Dairy Company when you do business here.

Milk Wagon Drivers, Inside Dairy Workers,
Local Union 603,
I. B. of T. C. W. & H. of A."

On the back of each pamphlet was a list of all the dairies in the St. Louis area except plaintiff. These pamphlets were distributed to other unions in the St. Louis area, and Local Union 603 caused its members to distribute the pamphlets at approximately sixty different retail grocery stores in the St. Louis area by handing them to members of the general public as the public was about to enter the stores. Maury Rubin made a statement in the Labor Tribune that over one-half million copies of the pamphlets had been distributed.

Defendant Patrick J. Burke, who was referred to as the "head man" of Local 603 and who is its Secretary-Treasurer and a member of its executive board, admitted that the purpose of distributing the pamphlets was "to get the public not to buy Adams Dairy products"; "to get the public to buy milk from people under contract with Local 603"; that the pamphlets were aimed to convey the message "do not buy Adams milk"; and were intended to create an agreement among the membership of Local 603 and to urge others not to buy Adams milk. The following answers given by Mr. Burke are typical:

"Q. So the purpose of this circular (pamphlet) was to limit their sales and take that business away from them? A. To take the business over to other companies, yes, who employ and negotiate wages with us.

* * * Q. Mr. Burke, the last sentence on this pamphlet or circular says (reading): 'We merely urge you to refrain from purchasing the products of Adams Dairy Company when you do business here.' A. Yes.

Q. Then you are trying to stop the sales in this store, is that correct? A. No.

Q. Of Adams milk? A. That's correct."

Defendants pleaded in their return to the order to show cause, and the evidence established, that with the exception of plaintiff's milk wagon drivers, all drivers of all the dairies in the St. Louis area are members of Local 603, and that all of said drivers are governed as to wages and working conditions by an identical industry wide contract. As a justification for the distribution of the pamphlets the defendants contended that the contract between plaintiff and the independent union differs from the contract to which Local 603 is a party; that this difference tends to weaken the bargaining position of Local 603; and that plaintiff had conducted an advertising campaign to induce the public to purchase milk at the store instead of by way of home delivery, and if this campaign were successful Local 603 would "lose much business," large numbers of salesmen-drivers of other dairies would lose their jobs, Local 603 would lose a substantial portion of its membership and would have its representation and bargaining position seriously reduced. The defendants then alleged that it was considered to be essential that an effort be made to counteract the advertising of plaintiff to have the public buy milk at the store, and that as a means of counteracting said publicity, Local Union 603 prepared the pamphlet for distribution to the general public. However, the evidence discloses that there are two other dairies in the St. Louis area which deliver milk at wholesale solely to retail stores, using members of Local 603 to do so, and no pamphlets were circulated urging the public not to buy the milk of those dairies. In addition several dairies, which used members of Local 603, distribute milk to both, the homes and to retail stores, but no pamphlets were circulated urging the public not to buy in the retail stores the milk of those dairies. The pamphlets made no mention whatever of the

interest of Local 603 in having milk delivered directly to the home, because, according to Mr. Burke, "We had other mediums through which we advertised buy your milk at the door," and Mr. Burke testified that the pamphlet was not directed to the point of urging people to buy milk at home or of keeping the jobs of the retail drivers. As to the allegations of the defendants that the differences in the contract impaired Local 603's bargaining position, Mr. Burke testified that he had not seen the contract between plaintiff and the independent union, and the evidence indicates that as compared to milk wagon drivers working under the contract of Local 603, plaintiff's milk wagon drivers receive a higher guaranteed weekly wage and make more money even though the commission rate is less for units in excess of 40,000 delivered in one month. Mr. Burke stated that he did not know of the difference in the commission rate when the campaign to stop the sale of plaintiff's products was started, and he subsequently testified that the purpose of the pamphlets was not to attempt to improve the working conditions of the men.

Mr. Walter Bush, president of Local 603 and a member of its executive board, stated that the pamphlets were distributed to "protect our membership, their livelihood and the income of the organization," and he also stated that the objective was to curtail plaintiff's business and sales. Reed J. White, a business representative of Local 603 and a member and the secretary of the executive board, stated that the purpose of the pamphlets was to inform the public that plaintiff's drivers were not members of Local 603, but he "couldn't say" that plaintiff could ever affect the loss of retail drivers.

Maury Rubin is the sole owner and publisher of the St. Louis Labor-Tribune which has a circulation of about 78,000. Burke is a member of the "Board of Advisors," of the Labor-Tribune, but for the past several years he

had not been solicited by Rubin for advice. Shortly after the distribution of the pamphlets was started by Local 603, Burke gave Rubin a copy of the pamphlet and explained the position of Local 603 concerning Adams Dairy Company, but Burke and Rubin stated that Burke did not request Rubin to do anything. However, with reference to Local 603's campaign to stop the sales of plaintiff's milk the defendants pleaded that Local 603 "caused to be published in the St. Louis Labor Tribune certain appeals to the public." The general tenor of the articles published were to urge the reading public not to buy Adams milk, and reference was made to "100% Union dairies" as contrasted to Adams Dairy. This was an incorrect and misleading statement in view of the certification of the independent union by the N. L. R. B. Rubin testified that the statement was an oversight, and that he meant that Adams Dairy was not a 100% A. F. of L. union dairy. Reference was also made in some of the articles to one of the large retail chain grocery stores as a "violator" because it continued to handle plaintiff's milk. In general, the articles also tended to give the impression that the independent union was not a bona fide union, although the N. L. R. B. had held it was, that a labor dispute existed between Local 603 and plaintiff, and that plaintiff was not fair to organized labor. Rubin also published an article in which he appealed to all union members not to purchase plaintiff's products "as long as they refuse to hire A. F. L. deliverymen." Starting with the issue of December 30, 1954, and in the next following four issues, Rubin printed in the Labor Tribune a coupon which he urged the readers to send to the grocery stores which they patronized. The wording of the coupon asked the store manager to carry exclusively the dairy products which were delivered by members of Local 603, and it was specifically mentioned that the products of Adams Dairy were the only dairy products not so delivered. This coupon contained an implied threat in that by sending

the coupon as urged by Rubin, the sender advised the grocery store manager that if he discontinued handling Adams Dairy products he would "spare" the sender the embarrassment as well as the necessity of going elsewhere to buy milk and other dairy products.

There also was evidence that during the time the pamphlets were being distributed and the articles run in the Labor-Tribune, some damage was done in some of the retail stores to products of plaintiff, but there was no evidence as to who did the damage other than the circumstances that at these stores drivers of Local 603 also delivered milk of other dairies and had access to plaintiff's milk in the store.

Burke stated that he was a member of the "Teamsters' Council" composed of representatives of 21 unions in the St. Louis area, and that he informed the other members that Local 603 was "carrying out a campaign for the public not to buy Adams Dairy products" but he stated that he did not urge the members to carry out the campaign in their respective unions. Bush, president of Local 603, visited numerous other unions and advised them that all dairies in the St. Louis area had contracts with Local 603 for the milk wagon drivers except Adams Dairy. At one time Burke accompanied Nick Blassie, representative of the Meat Cutters Union, when Blassie requested the owner of several super markets to discontinue patronizing plaintiff and to patronize other dairies who employed members of Local 603.

The facts of this case distinguish it from the usual "labor injunction" case. Here there is no labor dispute whatever between an employer and its employees or between an employer and a union. There are no organizational efforts by a union. In fact Local 603 denies most emphatically that it claims the right to represent plaintiff's milk truck drivers or that it even desires to represent

them. Neither is Local 603 attempting to improve working conditions nor is it attempting to compel compliance by plaintiff with any contract covering conditions of employment, and it is not attempting to have a nonunion employer maintain union working standards. Local 603 also takes the position that it does not have the objective of accomplishing anything that would result in a violation of the federal act, such as coercing plaintiff's employees to abandon the independent union, coercing plaintiff to interfere with the free choice of its employees as to which union should represent them, or by instituting that form of a secondary boycott made an unfair labor practice by Section 8 (b) (4).

The defendants frankly admit that by use of the pamphlets they entered into a campaign to obtain an agreement by the members of Local 603 not to purchase plaintiff's products, and to stop the purchase of plaintiff's products by the public. This concerted action constitutes a boycott of plaintiff's products, and the manner in which it has been carried out results in what has sometimes been termed a "consumption boycott" as distinguished from a "production boycott." C. C. H. Labor Law Reporter, par. 237 et seq. While there are many definitions of a boycott, in general, it may be said to include any activity on the part of a labor organization, or for that matter any other group of persons, whereby it is sought through concerted action, other than by reason of lawful competition, to obtain withdrawal of public patronage from one in business. See the annotations on the use of a boycott as a weapon in industrial disputes in 6 A. L. R. 909 and 116 A. L. R. 484. It is important to note that in discussing or defining a "labor boycott" reference is invariably made to the refusal to purchase, use or produce the products of an employer in connection with a labor dispute. In this case there is no bona fide labor dispute between Local 603 and plaintiff, or between Local 603 and the independent

union. Adams Dairy Co. v. Dairy Employees Union, Local 207 of International Brotherhood of Teamsters, etc., A. F. of L., 363 Mo. 182, 250 S. W. 2d 481 [3]; Purcell v. Journeymen Barbers & Beauticians International Union of America, Local 192-A, 234 Mo. App. 843, 133 S. W. 2d 662 [10].

A union may use various forms of concerted action, such as strike, picketing, or boycott, to enforce or obtain a lawful objective that is reasonably related to any legitimate interest of organized labor. Fred Wolferman, Inc., v. Root, 356 Mo. 976, 204 S. W. 2d 733 [2], 174 A. L. R. 585, cert. den. 333 U. S. 837, 68 S. Ct. 608, 92 L. Ed. 1122; Hobbs v. Poteet, 357 Mo. 152, 207 S. W. 2d 501 [2]; Caldwell v. Anderson, 357 Mo. 1199, 212 S. W. 2d 784 [3]; Annotations: 6 A. L. R. 909 and 116 A. L. R. 484; 31 Am. Jur., Labor, § 38. However, it is universally held that the objective of concerted labor activity must be a lawful one. Fred Wolferman, Inc., v. Root, supra [2]; State ex rel. Allai v. Thatch, 361 Mo. 190, 234 S. W. 2d 1 [9]; Kincaid-Webber Motor Co. v. Quinn, 362 Mo. 375, 241 S. W. 2d 886 [3]; Purcell v. Journeymen Barbers, supra [13]; George F. Stuhmer & Co. v. Korman, 241 App. Div. 702, 269 N. Y. S. 788 [1], affm'd 265 N. Y. 481, 193 N. E. 281; Moreland Theatres Corporation v. Portland Moving Picture Machine Operators' Protective Union, Local No. 159, 140 Ore. 35, 12 P. 2d 333 [11]; Sansom House Enterprises, Inc., v. Waiters and Waitresses Union, Local 301, A. F. L., 382 Pa. 476, 115 A. 2d 746 [1]; Dallas General Drivers, Warehousemen and Helpers v. Jax Beer Co. of Waco, Texas (Tex. Civ. App.), 276 S. W. 2d 384 [4]; Treasure, Inc., v. Hotel and Restaurant Employees and Bartenders' Union, Local 133 (A. F. of L.) (Fla.), 72 So. 2d 670 [1]; Dalzell Towing Co., Inc., v. United Marine Division, I. L. A., Local 333, 124 N. Y. S. 2d 70 [2], affm'd 120 N. Y. S. 2d 927, 281 App. Div. 968; Woodard v. Collier, 210 Ga. 239, 78 S. E. 2d 526 [2]; Wood v. O'Grady, 126

N. Y. S. 2d 408, 283 App. Div. 83; Annotations: 6 A. L. R. 909 and 116 A. L. R. 484. In addition to the requirement that the objective be lawful, the objective must be sought by lawful means. Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834; Missouri Cafeteria, Inc., v. McVey, 362 Mo. 583, 242 S. W. 2d 549 [2]; State ex rel. Allai v. Thatch, supra [9]; Annotations: 6 A. L. R. 909 and 116 A. L. R. 484. Otherwise the persons injured by such activity may obtain damages, injunctive relief or both. Fred Wolferman, Inc., v. Root, supra [2]; Missouri Cafeteria, Inc., v. McVey, supra [8]; Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., 27 Cal. 2d 599, 165 P. 2d 891 [1], 162 A. L. R. 1426; James v. Marinship Corporation, 25 Cal. 2d 721, 155 P. 2d 329 [2]; Annotations: 6 A. L. R. 909 and 116 A. L. R. 484.

Defendants contend that the purpose of the concerted activity was to encourage home delivery of milk and thereby protect the jobs of the retail drivers. However, not only is this contention not supported by the evidence, it is contrary thereto. The publications issued by the defendants do not mention this matter, and Mr. Burke unequivocally testified that the pamphlets were not directed to this objective. In addition, it is inconsistent with such objective to direct the pamphlets and coupons solely against plaintiff when two other dairies in the St. Louis area also deliver milk at wholesale only to retail stores, and other dairies deliver milk to the retail stores at wholesale and also make retail deliveries to the homes. The pamphlets, in effect, urge the public to buy milk at the stores, but not plaintiff's milk. If the objective were as contended by the defendants, it would be necessary to urge that the milk and milk products of the other dairies delivered to the retail stores not be purchased, which was not done. See George F. Stuhmer & Co. v. Korman, supra,

wherein it was held that where a union permitted the sale of nonunion made bread other than plaintiff's, this circumstance justified the inference that the purpose of picketing was to destroy plaintiff's business and not to better labor conditions. In addition, we may and do consider the circumstance that the defendants apparently never considered it to be in the interest of the retail drivers to stop or curtail the sales of plaintiff's products until plaintiff's milk drivers withdrew from Local 603. The retail drivers could be hurt no more, if at all, by plaintiff's operations after plaintiff's drivers left Local 603 than before.

It is also clear that the differences in the terms of the contracts could not have motivated the concerted activity because Mr. Burke had never seen the contract between plaintiff and the independent union, and it was not until after the distribution of the pamphlets was started that he learned of the difference in the commission rate.

The determination of the objectives of the defendants is a question of fact, Fred Wolferman, Inc., v. Root, supra [3], and from a careful consideration of the evidence and the circumstances, we are compelled to conclude that the objective of the concerted action was not any of the above contended purposes. Therefore, we need not consider whether the defendants would be justified in entering into a combination to stop the sale of plaintiff's products for these contended reasons.

The defendants next contend that the objective of their concerted action was to cause the public to buy milk delivered exclusively by members of Local 603. Although the pamphlets and the coupons were cleverly written to impart to the casual reader that a labor dispute existed between plaintiff and Local 603, which it did not, and that plaintiff did not employ 100% union labor, which it did, they did advance the appeal to the public not to buy the dairy prod-

ucts of plaintiff because they were not delivered by members of Local 603. This is somewhat kindred to the appeals made by unions to the public in connection with a labor dispute that it should buy or use only the products of an employer who hires union labor. However, plaintiff did hire 100% union labor, and regardless of the boundaries of justifiable conduct in an organizational campaign by a union, the circumstances here make the rules in such cases inapplicable. In this case plaintiff hired and used 100% union labor and it was required by federal law to recognize the independent union as the exclusive representative of all of its milk wagon drivers. It is forbidden by the same law from negotiating with Local 603 to have its milk delivered by members of that union. The admitted purpose of the concerted action was to take plaintiff's business away from it and to give the business to plaintiff's competitors. It is inconceivable that the public policy of this state should be to label as a legitimate labor objective the willful and intentional damaging or destruction of an employer's business because the employer is doing that which the federal law requires him to do and forbids him to change if he is to remain in business.

Concerted union activity has uniformly been held to be unlawful when the purpose is not primarily intended to benefit the union in carrying out a lawful objective or to improve working conditions, but has as its primary purpose injury to the business of the person against whom the action is directed. George F. Stuhmer & Co. v. Kormer, supra [1, 2]; Moreland Theatres Corp. v. Portland Moving Picture Machine Operators Protective Union, supra [7]; Overseas Storage Co. v. Chlopsek, 209 App. Div. 834, 204 N. Y. S. 845; Annotations at 27 A. L. R. 651, 32 A. L. R. 779 and 116 A. L. R. 484; 15 C. J. S. Conspiracy, § 10; 36 Am. Jur., Monopolies, Combinations and Restraints of Trade, § 27. In Aeolian Co. v. Fischer, 27 F. 2d 560, injunctive relief against a boycott involving the refusal to work

with non-union men was denied under the facts of that case, but in the opinion the court said:

> "How far the members of a craft may go in their organized capacity * * * depends upon the extent to which those who co-operate have in point of fact a common interest, and are justified in what they do by honest motives to advance self interest, as opposed to malicious intent to injure the business or good will of another."

We conclude from all the evidence and circumstances, and particularly from the admissions of the defendants, that the purpose of the concerted activity against plaintiff was not reasonably related to and not in the furtherance of any **legitimate** objective of Local 603, but was imposed and carried out by the defendants as a means of inflicting, as its primary objective, damage to plaintiff's business because the plaintiff, by requirement of law, was conducting its business contrary to the wishes of the defendants. This constituted a malicious interference with the business of another. 36 Am. Jur. Monopolies, Combinations and Restraints of Trade, § 26.

Section 416.010, R. S. Mo. 1949, V. A. M. S., entitled "Combination in restraint of trade declared a conspiracy" provides as follows: "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400." This statute has been held to be inapplicable to concerted activities of members of labor organizations carried on

for lawful objectives. Caldwell v. Anderson, 357 Mo. 1199, 212 S. W. 2d 784; Gruet Motor Car Co. v. Briner, Mo. App., 229 S. W. 2d 259. But it is applicable to concerted activities for an unlawful objective which result in a restraint of trade. Rogers v. Poteet, 355 Mo. 986, 199 S. W. 2d 378; Hobbs v. Poteet, supra; Empire Storage & Ice Co., v. Giboney, 357 Mo. 671, 210 S. W. 2d 55; and Giboney v. Empire Storage & Ice Co., supra; Anheuser-Busch, Inc., v. Weber, 364 Mo. 573, 265 S. W. 2d 325, rev'd on jurisdictional grounds, 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 546. The unlawfulness of a conspiracy may be found either in the end sought or the means used. Frank Schmidt Planing Mill Co. v. Mueller, Mo. App., 154 S. W. 2d 610 [2]; Sterns Lumber Co. v. Howelett, 260 Mass. 45, 157 N. E. 82 [1], 52 A. L. R. 1125, 15 C. J. S. Conspiracy §§ 3 and 4. Here the combination of the defendants to stop the sale of plaintiff's products had no lawful objective, it resulted in the restraint of the purchase and sale of plaintiff's products, and was, therefore, a conspiracy in violation of Section 416.010.

Although Maury Rubin is not an officer or member of Local 603, he voluntarily joined into the conspiracy with full knowledge of the objectives of the other defendants, and in aid thereof published misleading articles and published the coupons, containing the implied threat, appealing to his readers and to the public in general to stop the purchase and sale of plaintiff's products, and when the purpose of a combination is illegal, every act in furtherance thereof is illegal. Moreland Theatres Corporation v. Portland Moving Picture Machine Operators Protective Union, supra.

Defendants contend that they were engaging only in activities which are guaranteed against restraint by the first and fourteenth Amendments of the United States Constitution, and Missouri Constitution of 1945, Article I, section 8. They cite in support of this position Thorn-

hill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; Schneider v. State, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; United States v. Hutcheson, 312 U. S. 219, 243, 61 S. Ct. 463, 85 L. Ed. 788; Milk Wagon Drivers' Union, Local No. 753, etc., v. Lake Valley Farm Products, Inc., 311 U. S. 91, 61 S. Ct. 122, 85 L. Ed. 63; American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855, and other cases. We have read and studied all the cases cited and are of the opinion that none extends the constitutional guaranty of free speech to the situation here. In the interest of brevity we shall comment only on those case above-mentioned.

In Thornhill v. Alabama it was held that the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the United States Constitution, a general principle with which there is no dispute. But in Giboney v. Empire Storage & Ice Company, supra, the United States Supreme Court affirmed the valadity of Section 416.010, R. S. Mo., 1949, V. A. M. S., as applying to concerted activity of members of a labor organization, and in commenting upon Thornhill v. Alabama stated that the union's conduct in that case "constituted a single integrated course of conduct, which was in violation of Missouri's valid law" (Section 416.010), and that the constitutional right to freedom of the press and speech does not extend "its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."

Schneider v. State pertained to the validity of an ordinance which prohibited the distribution of handbills and circulars on the public street. That case did not involve any question pertaining to the right to pass out handbills or circulars in furtherance of an illegal conspiracy in violation of a valid state law.

United States v. Hutcheson was a criminal case in which the defendant was charged with the violation of the Sherman Antitrust Law. The conduct of the defendant had some similarity to the conduct here, except that a strike was involved and the whole dispute arose out of a jurisdictional dispute between two craft unions, while here we have no labor dispute, as far as the law of this state is concerned, between an employer and a union or between unions. The majority opinion apparently proceeded on the theory that the conduct probably constituted a violation of the Sherman Anti-Trust Act standing alone, but by passage of the Norris-La Guardia Act Congress had established the "public policy of the United States," and it was held that the Sherman Act, the Clayton Act and the Norris-La Guardia Act must all be read together as a "harmonizing text of outlawry of labor conduct." We have no statute in Missouri similar to the Norris-La Guardia Act purporting to limit the jurisdiction of the state courts over the conduct of the defendants in this case, and Missouri, rightfully or wrongfully, has not seen fit to exempt activities of labor unions and their members from its statute making illegal certain conspiracies in restraint of trade. Giboney v. Empire Storage & Ice Co., supra. As stated in the Giboney case, the constitutional guaranties do not "afford labor union members a peculiar immunity from [state] laws against trade restraint combinations." [336 U. S. at 495, 69 S. Ct. at 687, 93 L. Ed. at 840.]

Milk Wagon Drivers Union v. Lake Valley Farm Products pertained only to whether certain conduct was in furtherance of a "labor dispute" within the broad definition of that term as contained in the Norris-La Guardia Act which limited the jurisdiction of federal courts, and American Federation of Labor v. Swing held no more than that the constitutional guaranty of freedom of discussion is infringed by the common law policy of a state limiting peaceful picketing by labor unions to situations in which

the controversy is between the employer and his own employees.

This court recently held that concerted union activity in the form of "Picketing, even though properly conducted in all respects, may be enjoined if its objective is unlawful as violative of the public policy of a state, either legislatively or judicially declared. And the enjoining of unlawful-objective picketing does not constitute a denial of the constitutional guaranty of free speech." See Heath v. Motion Picture Machine Operators Union No. 170, Mo. Sup., 290 S. W. 2d 152, 157, and the cases there cited. Picketing is but a form of communication as is the distribution of the pamphlets and coupons in this case, and we see no material distinction between unlawful-objective picketing and the unlawful-objective distribution of pamphlets and coupons in furtherance of an illegal conspiracy in restraint of trade.

Although defendants deny any violation of the federal Act, they urge that if the facts are as contended by plaintiff neither the trial court nor this court has any jurisdiction over the subject matter of this action because the processes provided for in the federal Act are exclusive. This "delicate problem" (Weber v. Anheuser-Busch, Inc., 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 546) of jurisdiction is by no means settled, but in Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (A. F. L.), 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228, it was said that the federal Act "leaves much to the states," and by distinguishing the facts in that case from situations in which there is injurious conduct which the National Labor Relations Board is without express power to prevent, it was made clear that in many situations the states retain jurisdiction over concerted activity by labor unions. Express approval was given to the previous cases which held, in effect, that a state may exercise "its historical powers

over such traditionally local matters as public safety and order and the use of streets and highways," and as it has subsequently been said, "the contention that Congress intended to legislate for the entire field of labor controversy and excluded all State jurisdiction is untenable." Irving Subway Grating Co., Inc., v. Silverman, 117 F. Supp. 671. See also United Automobile, Aircraft and Agricultural Implement Workers of America, etc., v. Wisconsin Employment Relations Board, ... U. S. ..., 76 S. Ct. 794.

In Weber v. Anheuser-Busch, Inc., supra, it was held that where the "moving party itself alleges unfair labor practices [under the federal law], where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." It is clear from this statement that if these enumerated conditions are not present, state courts are not prohibited by reason of the federal Act from exercising jurisdiction. In this case plaintiff did not allege "unfair labor practices" under the federal Act, and we are of the opinion that the facts do not reasonably bring the controversy within the sections of the federal Act prohibiting "unfair labor practices" or within that conduct for which protection is afforded by that Act.

The defendants were not attempting to exercise any right guaranteed to labor organizations under Section 7 of the federal Act. The Supreme Court of the United States has held that Section 7 does not grant to employees or labor unions the right to engage in any and all concerted activity. The Act "does not excuse 'concerted activities,' themselves independently unlawful." N. L. R. B.

v. Peter Cailler Kohler Swiss Chocolates Co., Inc., 130 F. 2d 503. See also National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599, where the right to engage in concerted activities did not make legal a sit-down strike which state law made illegal. See also International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651, where it was pointed out that if the courts had not held that Section 7 did not include the right to violate the law, Congress would have done so, and that such provision was not specifically included in the present language of Section 7 because, as stated in H. R. Rep. No. 510, 80th Cong., 1st Sess., p. 38, "the courts have firmly established the rule that under the existing provisions of Section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct." Also see Local Union No. 1229, International Brotherhood of Electrical Workers v. N. L. R. B., 202 F. 2d 186, and the comment in footnote 17 that "concerted activity violating valid state law will not be protected by § 7 of the Act."

Defendants also contend that the state courts do not have jurisdiction because if the facts are as we have found them their conduct is of the nature and type made to constitute an unfair labor practice under Section 8 (b) (4). We do not agree. The evidence in this case clearly establishes that the pamphlets were distributed at the customer entrances of the retail stores, and that no attempt to stop deliveries was made and no deliveries were stopped. There is no evidence that any employee of the retail stores or the employees of any other employer was induced or coerced to go on strike or to refuse, in the course of their employment, to use, process or otherwise handle plaintiff's products. Neither is there substantial evidence that the defendants forced or attempted to force a secondary

employer subject to the federal Act to cease doing business with plaintiff. In Crowley's Milk Company, Inc. and Milk Drivers and Dairy Employees Local Union No. 680, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, A. F. of L. and United Dairy Workers Association, 102 N. L. R. B. 996, one Smith was ordered by the N. L. R. B. to be reinstated. The employer contended that Smith was not entitled to reinstatement because he had engaged in an unlawful boycott under Section 8 (b) (4). Note what was said by the N. L. R. B. at pages 997 and 998: "With respect to the alleged secondary boycott, Smith admitted at the second hearing that he had picketed two of the Respondent's **customers.** The only establishment identified was the Guernsey Crest Ice Cream Company of Paterson, where it appears that a picket sign was carried in front of the customers' entrance. The sign read in effect 'This establishment sells products of Crowley's Milk Company, which Company is on strike. Please do not buy Crowley's products. Teamsters Local 680, A. F. L.' When asked by Respondent's counsel at the second hearing if he did not picket Crowley's customers to influence the customers' employees to cease handling Crowley's products, Smith answered 'we picketed the stores so that the customers would not buy Crowley's products.' The foregoing is the only persuasive evidence adduced at either hearing concerning the alleged secondary boycott. Section 8 (b) (4) (A) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents—'. . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods . . . where an object thereof is . . . forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other pro-

ducer, processor or manufacturer, or to cease doing business with any other person. . . .' It is clear from the record that in picketing the premises of the Respondent's customers the Union intended to institute a **consumer** boycott only. There is no evidence, either direct or circumstantial, that the Union made any appeal to employees of the Respondent's customers, or ever picketed the employee or delivery entrances of any of the customers. In the circumstances the Union's secondary picketing, whether it be viewed as a direct appeal to the Respondent's customers or as an appeal to those doing business with the Respondent's customers, was not violative of Section 8 (b) (4) (A) of the Act." This order of the N. L. R. B. was subsequently enforced by the United States Circuit Court of Appeals. N. L. R. B. v. Crowley's Milk Co., Inc., 208 F. 2d 444.

In N. L. R. B. v. Business Machine and Office Appliance Mechanics Conference Board, Local 459, International Union of Electrical, Radio & Machine Workers, CIO, 228 F. 2d 553, the court, in commenting on the scope of Section 8 (b) (4) said: "But the Taft-Hartley Act does not proscribe all secondary activity. We have held that requests and threats addressed directly to secondary employers are not illegal, Rabouin v. N. L. R. B., 195 F. 2d 906, 911, 912; see N. L. R. B. v. Associated Musicians of Greater New York, Local 802, 226 F. 2d 900; and we have indicated that solicitation of customers of secondary employers is also lawful. See N. L. R. B. v. Service Trade, Chauffeurs, Salesmen, and Helpers, Local 145, supra, at 191 F. 2d at page 68. The only thing proscribed by § 8 (b) (4) is inducement or encouragement of the employees of customers." See also Administrative Decision of the General Counsel [of N. L. R. B.], Case No. K-147, Jan. 12, 1956, C. C. H. Labor Law Reporter, par. 53,495, which pertained to a situation involving activity similar to that in this case, and Milwaukee Boston Store Co. v.

American Federation of Hosiery Workers, Branch 16, A. F. of L., 269 Wis. 338, 69 N. W. 2d 762 [7].

We have concluded in this case that the acts of the defendants constituted an illegal conspiracy in violation of the laws of this state, and that the boycott pursuant to that conspiracy was not imposed or carried out for any lawful labor objective. This case falls exactly within the ruling in G., H. & E. Freydberg, Inc., v. International Ladies Garment Workers' Union, 128 N. Y. S. 2d 470. There the union picketed an employer for the purpose of compelling it to maintain a factory in New York. The court said: "I think * * * that is not a lawful labor objective, that there consequently is no labor dispute or any controversy involving labor relations, and that the picketing, even if peaceful, is unlawful because it is an attempt to injure plaintiff by subjecting it to economic pressure without justification in law. * * * As to the question of jurisdiction, I assume in defendants' favor the plaintiff is engaged in interstate commerce. From that it follows that existing Federal statutes so completely cover the subject of labor relations in interstate commerce that neither State statutes nor State courts can add to or subtract from the rights and immunities of employers or employees as specified in those Federal statutes. [Cases cited including Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (A. F. L.)] * * * But my holding that this picketing is not for a lawful labor objective takes this case out of the field of labor relations and out of the doctrine of those cases. This picketing is not an exercise of any right conferred, recognized, or regulated by any Federal statute, and is not designed to enforce or secure recognition of any such right, or to prevent conduct by plaintiff which any Federal statute denounces as 'an unfair labor practice'; and the injunction is not sought in order to prevent conduct by defendants which any Federal statute denounces as an unfair labor practice. The picketing is

a tortious act under the law of New York entirely apart from any labor relation; and as I see it this case is precisely what the Supreme Court said the Garner case was not, namely, 'an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is "governable by the State or is entirely ungoverned."' See 346 U. S., at page 488, 74 S. Ct., at 164."

This case is distinguishable from Graybar Electric Company, Inc., v. Automotive, Petroleum & Allied Industries Employees Union, Local 618, Mo. Sup., 287 S. W. 2d 794; and Jack Cooper Transport Company v. Stufflebeam, Mo. Sup., 280 S. W. 2d 832, in that the concerted activity of the defendants in this case was not done in furtherance of any legitimate objective of a labor union, and the facts do not "reasonably bring the controversy within the sections [of the federal Act] prohibiting these practices, and * * * the conduct, if not prohibited by the federal Act, may [not] be reasonably deemed to come within the protection afforded by that Act." See Weber v. Anheuser-Busch, Inc., supra.

For the reasons above set forth the trial court erred in denying the plaintiff injunctive relief from the conduct of the defendants, and therefore the judgment is reversed and the cause remanded for further proceedings in accordance with the views here expressed.

Alden A. Stockard,
Commissioner.

Bohling, C., concurs.
Barrett, C., concurs.

Per Curiam: The foregoing opinion by Stockard, C., is adopted as the opinion of the Court. All concur.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 580.

PATRICK J. BURKE, REED J. WHITE, CHARLES SPEICKERMAN, THOMAS CONROY, ROBERT A. STEWART and FACKNEY L. SMITH, Individually and as Officers and Members of Milk Wagon Drivers and Inside Dairy Employees Union, Local 603, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and as Representatives of the Class Consisting of the Members of Milk Wagon Drivers and Inside Dairy Employees Union, Local 603, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and MAURY E. RUBIN, Doing Business as St. Louis Labor Tribune,
Petitioners,

v.

ADAMS DAIRY, INC.,
Respondent.

BRIEF OF RESPONDENT, ADAMS DAIRY, INC., IN OPPOSITION TO WRIT OF CERTIORARI.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Circuit Court of St. Louis County, Missouri, denying injunctive relief is unreported, but is contained in the record (R. 309 through

312). The opinion of the Supreme Court of Missouri is not yet officially reported, but is reported in 293 S. W. 2d 281.

JURISDICTION OF THIS COURT.

In filing their petition for a writ of certiorari, petitioners have invoked the jurisdiction of this Court under Title 28, U. S. C. A., Section 1257 (3) (June 25, 1948, c. 646, 62 Stat. 929).

STATUTES OF THE STATE OF MISSOURI INVOLVED.

The case involves the action of the Supreme Court of Missouri in directing the Circuit Court of Missouri to enjoin the violation of Missouri statutes which prohibit restraints of trade and prescribe both criminal and civil penalties for violations.

The Missouri anti-trade restraint statutes are contained in Chapter 416 of the official compilation, entitled "Monopolies, Discriminations and Conspiracies" (2 Revised Statutes of Missouri, Sec. 416.010 et seq., pp. 3318-3320; 21 V. A. M. S., Sec. 416.010 et seq., pp. 849, 869-872, 877). The pertinent provisions of these statutes are set out in Appendix A of this brief.

QUESTIONS PRESENTED.

1. Does the Missouri Supreme Court have jurisdiction to direct a Missouri Circuit Court to enjoin the petitioners, one of which is a labor union, from committing certain acts which violate a criminal statute and the public policy of the State of Missouri?

2. Can the Missouri Supreme Court, consistent with the Fourteenth Amendment to the Constitution of the United States, direct a lower court to enjoin circular distribu-

tion as one of several acts participated in by petitioners, all of which acts the Supreme Court finds in violation of a criminal statute and the public policy of the state?

3. Can the Missouri Supreme Court, consistent with the Fourteenth Amendment to the Constitution of the United States, direct a lower court to enjoin the petitioner-owner of a newspaper from publishing certain articles which the Court finds from the facts in the case to be one of several acts, all of which violated the criminal laws and public policy of the state?

STATEMENT OF FACTS.

Adams Dairy, Inc., hereinafter referred to as "Adams," is a Missouri corporation, engaged in processing milk and milk products in St. Louis, Missouri, and selling these products exclusively at wholesale for resale by others to the consuming public (R. 7, 19).

The petitioners include (1) six certain individuals sued as individuals, officers and members of a labor union, the Milk Wagon Drivers and Inside Dairy Employees Union Local 603, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and as representative of the class consisting of the members of this union (R. 7, 8); (2) Local 603, Milk Wagon Drivers and Inside Dairy Employees Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL; and (3) Maury E. Rubin, d/b/a St. Louis Labor Tribune (R. 8).

Adams' employees prior to July 26, 1954, were grouped into three categories: (1) Inside Workers and Clerical Employees; (2) Ice Cream Wagon Drivers; (3) Milk Wagon Drivers, all covered by separate contracts with the Petitioner Union Local 603 (R. 9, 10, 24). Petitioner Local 603 in July, 1954, also had contracts with each and every

other dairy in the St. Louis area employing these three categories of employees (R. 49, 50).

On July 26, 1954, the Milk Wagon Drivers employed by Adams, in an NLRB supervised election, voted to be represented by the Independent Wholesale Dairy Products Salesmen's Association, hereinafter referred to as "Association," and it was certified by the NLRB to be the bargaining agent for this group of employees. Adams then negotiated and entered into a contract with the Association (R. 9, 10, 21). Thus, by September 1, 1954, Adams had one contract covering Milk Wagon Drivers with the Association running through August 31, 1956, and two contracts with Petitioner Local 603 running through July 30, 1956.

In October, 1954, representatives from Petitioner Local Union 603 began to visit various union meetings urging that union members should purchase only that milk delivered by Petitioner Local 603 (R. 56, 58, 150, 152). The officers of the Petitioner Local 603 notified Petitioner Maury Rubin, owner of the St. Louis Labor Tribune, of their planned campaign. They admittedly caused to be published in his newspaper certain articles which urged the public to buy only milk delivered by petitioner Local 603 members (R. 28). In furtherance of this campaign the newspaper carried printed coupons to be signed and mailed to the owners of stores carrying Adams milk. Each coupon stated that the signer of the coupon wanted milk delivered by petitioner Local 603 (R. 235, 236). The newspaper articles said Adams milk "was not delivered by 'union' drivers" (R. 234, 239, 240), and carried a statement that after Adams lost its business, Local 603 would find jobs for Adams' employees in other dairies under contract to them (Plaintiff's Exhibit N). The articles charged one of Adams' largest customers as a "violator" for selling Adams milk (Plaintiff's Exhibit O). The petitioner Local 603, starting in late October or early Novem-

ber, 1954, stationed men at the stores which bought Adams milk and distributed circulars containing false and misleading statements about Adams urging the public to buy only that milk delivered by petitioner Local 603. On the back of each circular was printed the name of every dairy in the St. Louis area whose drivers were under contract to petitioner Local 603.

At the same time, the individual petitioner Patrick Burke, Secretary-Treasurer of petitioner 603, together with the head of Meat Cutters Local Union, visited the president of at least one of Adams' largest customers. He was asked to have his chain of stores discontinue buying Adams milk and buy only milk delivered by Local 603 (R. 97, 98).

Adams lost many stores as customers (R. 274). In this same period Adams' milk cartons were mutilated in the stores offering their products for sale (R. 124, 134, 144).

On January 26, 1955, Adams filed suit against the petitioners in the Circuit Court of St. Louis County, Mo. The suit was based on the Revised Statutes of Missouri, 1949, Section 416.010 et seq., which is a criminal statute prohibiting a conspiracy in restraint of trade. Adams asked the court for treble money damages and for a restraining order enjoining the petitioners from: (a) directly or indirecting ordering or suggesting to members of Local 603, or other affiilated unions, that they mutilate, destroy or damage the products of the plaintiff; that they discriminate in any way against the plaintiff or its products in the purchase or sale or offering for sale, or display or handling the plaintiff's products; (b) engaging in any picketing or circularizing or causing others to picket or circularize in front of, around or adjacent to the stores of the plaintiff's customers; (c) placing the plaintiff's name on any unfair lists; (d) impeding or interfering in any way with the operation of the plaintiff's business in the Metropolitan St. Louis area; (e) directly or indirectly ordering or sug-

gesting to the customers of the plaintiff that they cease doing business with the plaintiff; (f) doing each and every act to establish a monopoly in the distribution of milk in the St. Louis area; (g) publishing and circulating false and misleading statements directly or indirectly made in the St. Louis Labor Tribune that the plaintiff has a company dominated union, that the stores of customers are violators who purchase plaintiff's products, and that a labor dispute exists at plaintiff's place of business when in truth and in fact such allegations are false; (h) coercing through the publishing in the St. Louis Labor Tribune the reading public of said newspaper from purchasing the plaintiff's products for the sole reason that they are delivered by driver-salesmen who are not members of an A. F. L. affiliate (R. 16, 17).

The Court issued its Order to Show Cause and on February 2, 1956, the petitioners filed a joint answer. This Answer, after setting out certain technical admissions and denials and admitting that they caused articles to be published in petitioner Maury Rubin's St. Louis Labor Tribune, stated that their conduct was proper because it sought to: (a) encourage home delivery of milk; (b) advise the general public of the non-A. F. of L. status of Adams' drivers. Petitioners stated that their activities were protected under the First and Fourteenth Amendments to the Constitution of the United States. Further, they claimed that the trial court was without jurisdiction to hear and determine the matter because it was pre-empted by Federal authority under the Labor Management Relations Act of 1947, hereinafter referred to as the Taft-Hartley Act (R. 19 through 40).

The parties agreed to a hearing on the temporary and permanent injunction together by the lower court and stipulated that that portion of the plaintiff's petition dealing with damages would be reserved for a hearing on a later date.

OPINIONS OF THE COURTS BELOW.

The trial court denied the injunction (R. 309, 312). On appeal the Missouri Supreme Court held that the facts of the case clearly showed that the acts committed by the petitioner labor union were neither protected nor prohibited by the Taft-Hartley Act (R. 337, 342). Further, they found from the evidence that petitioner Maury Rubin, owner of a newspaper, voluntarily joined into the conspiracy with full knowledge of the objectives of the other petitioners and furthered the conspiracy by publishing misleading articles, some of which contained implied threats (R. 334).

The Supreme Court of Missouri examined the facts in the light of the decisions of the Supreme Court of the United States dealing with the Fourteenth Amendment to the United States Constitution, and found that this constitutional provision does not extend its immunity to speech or writing used as part of conduct in violation of a valid state criminal statute (R. 335, 337). They thereupon reversed the lower court and remanded the cause for **further proceedings in accordance with their views.**

The petitioners then asked for a stay of the mandate to the lower court while they filed their petition for a Writ of Certiorari to this Court. The respondent requested that the mandate issue or the petitioners post security as provided by Federal law [28 U. S. C. 2101 (f)]. The Missouri Court stayed the mandate upon the petitioners' filing a ten thousand dollar bond pending the determination of this court of the application for the Writ of Certiorari.

ARGUMENT AGAINST ISSUING THE WRIT OF CERTIORARI.

I.

The labeling of any litigation in which a labor union and an employer are parties as a "Labor Dispute"[1] is not the touchstone for escapement from valid state criminal statutes on the grounds of preemption. An examination of the facts in this litigation and the relief sought reveals that the particular activity engaged in by the petitioners was a carefully charted course to engage in activity which was not violative of the Taft-Hartley Act of 1947. Such conduct, under examination, reveals that it also is activity which is not protected under the Act.

The Petitioners in requesting a Writ of Certiorari attempt to confuse the issue of the respondent requesting, and the Supreme Court ordering, an injunction against some eight acts of the petitioners by questioning the right of a state court to enjoin circular distribution by one of the petitioners.

The petitioners pleaded in their answer that the purpose of the circular was only to encourage home delivery of milk (R. 27). Yet the Petitioner Patrick J. Burke admitted under oath that he knew two of the dairies that were listed as "approved" delivered only to stores (R. 79). Further, he said that the union was trying to stop only the sales of Adams Milk (R. 74, 75). Further by answer and sworn statement the Petitioners stated they were not attempting to organize the drivers of Adams (R. 24, 25).

The petitioners cite authorities, all of which deal with picketing growing out of a labor dispute. The facts in

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1 Note the petitioners in their brief for a Writ of Certiorari head their statement as Labor Dispute.

these cases reveal that the litigants were involved in: a) Controversies over representation or organization; b) Controversies between employees of the same employer; c) Controversies involving jurisdiction of performance of work. None of the controversies listed falls within the factual circumstance of this litigation nor is this litigation under a state act which has covered the same field as the Taft-Hartley Act.

Section 7 of the Taft-Hartley Act guarantees to employees certain rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Petitioner Local 603 represented, and had under contracts running for more than 17 months, employees of Adams. They were not seeking any benefits or rights for these employees. The other employees who were not represented by Petitioner 603 were in the Association, a certified bargaining unit whose contract did not expire for more than 18 months. **Local 603 disavows any interest in influencing any of these employees.** Thus the circularizing, by the union, the implied threats by the newspapers, the discussions with store owners cannot be said to be protected activity.

Under the federal act the employer can be guilty of unfair labor activities and all these unfair acts are listed under Section 8 (a). This section cannot govern preemption since it covers **employer** activities.

Section 8 (b) deals with unfair labor practices of unions and lists six types of activities. An examination of these six shows that the factual situation herein cannot be stretched to include any of these six acts.

Section 8 (b) (1) concerns itself with restraint and coercion of employees in the exercise of their rights as guaranteed in Section 7. Local 603 disclaims that they wanted to organize the drivers who were under bar by contract.

Section 8 (b) (2) deals with discrimination by an employer against an employee with respect to whom membership in a labor organization has been denied or terminated. No such factual situation is present here.

Section 8 (b) (3) involves the refusal to bargain. There is no bargaining in process or contemplated by either party in this situation as all contracts have been signed.

Section 8 (b) (4) deals with strikes and secondary boycotts. Adams was not struck by any of the Petitioners. There can be no secondary boycott present unless employees of secondary employers are stopped or attempted to be stopped from handling, processing or working on material of the primary employer. Petitioner very carefully refrained from this type of activity. The petitioners including the newspaper were attempting to influence and move the ultimate consumer, and not the employees of the purchasers of Adams products.

Section 8 (b) (5) dealing with excessive initiation fees is not involved in this case.

Section 8 (b) (6) deals with exactions for work not performed and this has no bearing on the present factual situation.

This Court has exhaustively examined the situation where Petitioners have raised the issue that the Taft-Hartley Act has given the federal courts exclusive jurisdiction. Justice Frankfurter in **Weber v. Anheuser-Busch,** 348 U. S. 468, 99 L. Ed. 546, 75 S. Ct. 480, summarized those decisions wherein the Supreme Court under both the Wagner Act and the Taft-Hartley Law has defined the area of Federal and State jurisdiction.

He pointed out that the state may not prohibit the exercise of rights which the Federal Acts protect. **Hill v. Florida,** 325 U. S. 538, 89 L. Ed. 1782, 65 S. Ct. 1373. Further, he pointed out, where the state act duplicates the

provisions of the Federal act, the Federal act is supreme. Also, where the state statute denies a right which Congress has guaranteed under Section 7 of the Taft-Hartley Act, the state is powerless to enjoin such action. **Garner v. Teamsters C. & H. Local Union,** 346 U. S. 485, 499, 98 L. Ed. 228, 244, 74 S. Ct. 161. All problems dealing with certification and the interpretation of certification, the Justice stated, give the Federal courts exclusive jurisdiction. In this review it was pointed out that the state was properly exercising its function when it enjoined mass picketing, threats of bodily injury, property damage to employers, obstruction of roads and blocking of entrances to factories by mass picketing. **Allen-Bradley Local v. Wisconsin Employment Relations Board,** 315 U. S. 740, 86 L. Ed. 1154, 62 S. Ct. 820. The state courts had the right to grant an injunction where the conduct of a union involved recurrent work stoppages. **International Union v. Wisconsin Employment Relations Board,** 336 U. S. 245, 93 L. Ed. 651, 69 S. Ct. 516. The Court held in this case that the injunction was proper since **this activity was neither prohibited nor protected by the Taft-Hartley Act, and thus was open to state control.** The Supreme Court has allowed a state to forbid the enforcement of a maintenance of membership clause in a contract, since nothing in the Taft-Hartley Act sanctioned or forbade these clauses. **Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,** 336 U. S. 301, 93 L. Ed. 691, 69 S. Ct. 584. Further, the Supreme Court has decreed that common law tort actions involving labor unions were under the jurisdiction of the state courts even though an unfair labor practice under the Taft-Hartley Act was involved, on the theory that there was no compensatory relief under the Federal Act and no Federal administrative relief with which the state remedy conflicted. **United Construction Workers v. Laburnum,** 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025.

Petitioners in this case became involved in activities which violated a criminal statute of the State of Missouri prohibiting a conspiracy in the restraint of trade. The petitioners, Local 603 and the petitioner Maury Rubin, d/b/a St. Louis Labor Tribune, were attempting to restrain the sale of Adams products in the St. Louis area. None of the acts committed by any of the petitioners falls within the scope of the Taft-Hartley Act. Certainly the petitioner Maury Rubin, d/b/a St. Louis Labor Tribune, cannot claim that any of his activity came under the protection or prohibitions of the Taft-Hartley Act.

The petitioner, Local 603, carefully tread the delicate line so as not to do any act that smacked of an unfair labor charge. Their activity was not protected by the Act, they were not seeking any employment or betterment for their members. It becomes a question of fact to determine whether they were seeking to promote, as they stated, the home delivery of milk. According to the findings of the Supreme Court of Missouri this they failed to establish.

The Court found that during the almost seven years when Local 603 represented all the drivers of Adams, the union found no fault with delivery of milk to stores, but four months after they had lost the representation of the drivers to the Association and while they still had contracts with Adams representing the inside workers and ice cream drivers, they started on a campaign to limit the sales of Adams, who delivered only to stores. They chose to disregard two other dairies delivering exclusively to stores, whose driver employees they represent, and in their circulizing and in their implied threats and misleading statements in the St. Louis Labor Tribune, they did not point out that these also delivered milk wholesale. The circular, itself, made no mention or reference to home delivery.

The petitioners rely heavily on **Weber v. Anheuser-Busch,** supra. In that case there was a jurisdictional dis-

pute. Negotiation between the employer and the union to resolve the dispute ended in deadlock which in turn resulted in picketing. Respondent respectfully directs the attention of this Court to the fact that the activity in the Adams case did not arise out of any negotiation, discussion, request or demands of either the employer from the union or of the union from the employer. Petitioner Local 603's demand was on the public to stop buying Adams' products.

The state Supreme Court found that petitioners' activities constituted an illegal restraint of trade and the activities were against the public policy of the state. Certainly, in a situation like this, the state court has a right to rule under its statutes dealing with restraint of trades and the public policy of the state. The argument of preemption so urgently pressed by the Petitioner Local 603 does not bear review by this Court which has decided the matter many times.

II.

The second and third questions presented to this court as a basis for granting a writ of certiorari are basically the same question, but presented in two separate forms, one under the label of "labor union" and the other under the label of "newspaper." There is no mysticism about a labor union or a newspaper. As parties to a law suit they are accorded only the same privileges and immunities under the Fourteenth Amendment to the United States Constitution as any other person. **Empire Storage and Ice Co. v. Joseph Giboney et al.**, 357 Mo, 671, 210 S. W. (2) 55, affim'd 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834. The rights of free speech and press have been properly limited in those cases where the Union has made false statements or has used its rights of free speech and press for an unlawful purpose. The Supreme Court of Missouri has made a finding of fact that the union and the newspaper have made misleading statements and implied threats

(R. 334). The court below pointed out that the unlawfulness of a conspiracy may be found in the ultimate end sought or the means used. The Court stated:

> "Here the combination of the defendants to stop the sale of plaintiff's products had no lawful objective, it resulted in the restraint of the purchase and sale of plaintiff's products and was, therefore, a conspiracy in violation of Section 416.010" [Referring to the Anti-Trust Statutes of Missouri (R. 334)].

The court further pointed out that when the purpose of a combination is illegal, every act in furtherance thereof is illegal (R. 334).

The petitioners' entire activities tried to imply that Adams was involved in a labor dispute, which was not the truth. When a labor union uses false statements, its cries of freedom of speech cannot be heard. **Cafeteria Employees Union v. Angelos**, 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58, see also cases collated at 174 A. L. R. 594.

The Petitioners cite **Thornhill v. Alabama**, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; **Bakery Drivers and Helpers IBT v. Wohl**, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178; **Milk Wagon Drivers v. Lake Valley Farm Products**, 311 U. S. 91, 61 S. Ct. 122, 85 L. Ed. 63; **American Federation of Labor v. Swing**, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855, as authority that their activity was shrouded with the protective coverage of the guarantees of free speech.

The Supreme Court of the United States has considered these same cases in the **Giboney** case, supra, and enunciated the principle that the guarantees of free speech do not cover activities which violate the valid criminal statutes of a state. The **Giboney** case, supra, held this true on the same state statute involved herein. This rule was further defined in **Building Service Employees International Union, Local 262 et al. v. W. L. Gazzam**, 339 U. S. 532, 70 S. Ct. 784, 94

L. Ed. 1045. In **Hughes v. Superior Court of California,** 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718, this court, in the majority opinion, stated the due process clause did not preclude the state from securing respect for its policy even if that policy was expressed by the state's judicial organ rather than by the legislature. Three Justices, Reed, Minton and Black, concurred, relying on **Giboney**, supra.

There is nothing on the question of free speech raised in this case that this court has not previously determined. The law under which the Missouri Court ruled is the same law which was interpreted by this court in the light of the Fourteenth Amendment in the **Giboney** case, supra. This criminal statute was enforced in **Rogers v. Poteet et al.**, 355 Mo. 986, 199 S. W. (2) 378. The petitioners in that case filed a motion for a Writ of Certiorari to this Supreme Court which denied the writ 331 U. S. 847, 67 S. Ct. 1732, 91 L. Ed. 1856. Recently this court was presented this same question on the Fourteenth Amendment in **Pappas v. Stacy**, 116 A. (2) 497. This court refused certiorari 100 L. Ed. 73 (No. 336, Oct. Term, 1955).

SUMMATION.

THE WRIT OF CERTIORARI MUST BE DENIED.

To sum up the matter before this court, we have here a lawsuit brought by a company against a union, the members of a union and an individual owner of a newspaper. The suit is bottomed on the violation of the Missouri State Criminal Statute prohibiting a conspiracy in restraint of trade. The Missouri Supreme Court found the Company has borne the burden of evidence and proved the facts as alleged. The Missouri Supreme Court has ruled that the lower court should enjoin the conduct found violative of the Criminal Statute and have the hearing on the alleged damages. The lower court has not issued the injunction

awaiting the decision of this Court as to whether this Court desires to review on a Writ of Certiorari.

There is no question that a State has the right of enacting statutes limiting restraint of trade and making them applicable to all persons. The questions presented to this Court answered in the light of the facts of the case indicate that labor's legitimate interest in achieving and maintaining certain standards of wages, hours and working conditions and further doing these acts under the representation by the parties selected by them is not affected by this ruling of the Missouri Court. The facts present no labor practice which is either condemned or condoned by the federal statutes.

This Court has many times examined the constitutional guaranties of freedom of speech in similar situations and laid down the metes and bounds of those guaranties in this field on similar facts. None of the decisions by this Court on the subject are in conflict with the decision of the lower Court.

CONCLUSION.

For the reasons above stated, the Petition for Writ of Certiorari must be denied.

Respectfully submitted

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APPENDIX A.

Pertinent provisions of Chapter 416 of the Revised Statutes of Missouri referred to in this brief.

Chapter 416: Monopolies, Discriminations and Conspiracies.

Section 416.010: "Combination in restraint of trade declared a conspiracy":

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400" (21 V. A. M. S., Sec. 416.010).

Section 416.050: "Penalties":

> "Any person violating any of the provisions of sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400 or who shall do any act prohibited or declared unlawful by the provisions of said sections, shall be adjudged guilty of a felony, * * *" (21 V. A. M. S., Sec. 416.050).

Section 416.090, "Persons injured to recover triple damages":

> "Any person injured in his business or property by any other person by reason of anything forbidden or

declared to be unlawful by sections 416.010 to 416.100 * * * shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee" (21 V. A. M. S., Sec. 416.090).

The provisions of Chapter 416 were incorporated into Missouri statutory law in the period 1891-1907. They are in no sense "labor legislation" or "labor regulatory statutes."